Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	WC Docket No. 06-74
BellSouth Corporation	)	
Transferor	)	
	)	
To	)	
AT&T, Inc.	)	
Transferee	)	
	)	

To The Commission:

PETITION TO DENY
OF
THE CONCERNED MAYORS ALLIANCE

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Dated: June 5, 2006

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SUMMARY

The Concerned Mayors Alliance ("CMA") herein requests that the Commission deny its consent to the transfer of the applications at issue in this proceeding. CMA submits that this merger presents substantial public interest concerns, and that the Commission's denial is necessary to ensure that the public interest is protected.

The proposed merger has the potential to exacerbate the differences in access to telecommunications services based on race, income level and geography. AT&T has allegedly engaged in the practice of redlining in the deployment of its cable, telephony and data services throughout the United States. Moreover, the proposed merger offers only speculative competitive benefits to our local telecommunications markets. An anticompetitive merger is simply not necessary in this instance.

The merger would create an opportunity for this new giant to exercise monopoly power in the telecommunications industry. AT&T and BellSouth have also demonstrated their aversion to competition by seeking to end longstanding national policy on network neutrality and local video franchising.

The CMA believes that the Commission can and should deny the applications for transfer outright. Alternatively, if the Commission deems it necessary to approve the merger, it should impose conditions and procedures similar to those imposed in the merger between SBC and Ameritech.

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The Concerned Mayors Alliance ("CMA" or "Petitioner") hereby submits this Petition to Deny, urging the Commission to deny the above-referenced applications for consent to transfer control of certain telecommunications licenses from BellSouth to AT&T, Inc. ("AT&T") (collectively, "Applicants").

The Petitioner believes that granting the applications will not be in the public interest, as this merger offers no competitive benefits to the local exchange market or video programming and Internet businesses, and will reestablish AT&T as a dominant carrier in the long distance, local wireless satellite and subsequently cable industries. Finally, the Commission must evaluate

whether this merger is in the public interest, in light of AT&T's (and its predecessors) prior record of alleged redlining practices in the deployment of its cable, high-speed data and telephony services throughout the United States.

The Petitioner submits the following arguments in support of its Petition, and urges the Commission to hold a series of hearings in light of this Petition.

STATEMENT OF PETITIONER'S INTEREST

The CMA is an alliance of Mayors throughout the country that are concerned about telecommunication services provided to their constituents. The CMA promotes competition in the telecommunications industry to (1) allow constituents more choices when choosing a telecommunications provider; (2) encourage local government regulation of the telecommunication's industry; (3) enhance of local small businesses in the telecom sector; and (4) provide service to all citizens regardless of race, income or geography. The CMA also promotes the competitive and social benefits of network neutrality and local video franchising.

JURISDICTION

The Commission has personal jurisdiction over the Applicants, 47 U.S.C. §§ 301, 303, (a) 307, 308, 310, 601 and it has subject matter jurisdiction over the allegations in this Petition, 47 U.S.C. §§ 214(a), 254(b), 257, 303(f), 303(g), 307(a), 307(c), 310, 601, and 621.

This Petition contains "specific allegations of fact sufficient to show ... that a grant of the application[s] would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. §309(d)(1); *Astroline Communications Co. v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988); *Dubuque T V. Limited Partnership,* 4 FCC Rcd. 1999 (1989).

The allegations herein, except those of which official notice may be taken, are (and will further be) supported by factual evidence and by the declarations of a person with knowledge of the facts alleged and attesting to the Petitioner's allegations raised in this matter. 47 U.S.C. 309(d)(1); *see 47* CFR § 1.16. Appended hereto is a declaration by the CMA. The mayors are elected leaders of municipalities in the United States that receive telecommunications services from AT&T or BellSouth. *See* Maumee Valley Broadcasting, Inc., *Memorandum Opinion and Order,* 12 FCC Rcd. 3487,114-6 (1997) (prerequisite for standing is one's ability to receive transmissions from Title III licensee).

Furthermore, this Petition is appropriate for review, 47 U.S.C. § 309(d)(1) and 47 CFR §§ 1.45(a), 1.939, and fully complies with the Commission's rules governing pleadings, 47 CFR §§ 1.48, 1.49, 1.51 and 1.52, petitions to deny, 47 CFR §§ 63.52(c), and service of process, 47 CFR § 1.47. Therefore, Petitioner has met all jurisdictional requirements, and its allegations must be fully considered on the merits.

DISCUSSION

I. FCC INTERVENTION IN THE MERGER IS NECESSARY TO PROTECT THE PUBLIC INTEREST

As required by the Telecommunications Act of 1996, the Commission has an obligation to ensure that telecommunications services are provided on a universal basis. The Petitioner believes that the proposed merger will not, among other things, promote universal service and therefore is not in the public interest. AT&T and BellSouth have filed a skeleton application. The application stands mute on virtually all of the major public interest issues attendant to mergers of this nature and size, including redlining, anti-trust matters, network neutrality and video

franchising, and, all of which impact the carriers commitment to universal service. The Application fails to explain how the new enterprise will address BellSouth & AT&T's practice of "redlining" in the deployment of cable, telephony and data services. Therefore, the Commission's comprehensive review is necessary to protect the public in this regard.

"Whether the proposed merger would aggravate a situation where either of the merging parties deployed telecommunications facilities in a discriminatory manner" is a factor in the Commission's public interest determination.[1] The Commission also has stated that its analysis of the Bell Atlantic/NYNEX merger "would have been greatly assisted by a fuller description of [Bell Atlantic's] actual plans, even if Bell Atlantic believed those plans were irrelevant." NYNEX Corporation and Bell Atlantic Corporation, *Memorandum Opinion and Order, 12* FCC Rcd. 19985, 243 (1997) *("Bell Atlantic/NYNEX Order").*

The Applicants fail to address how the merged company will promote universal service through the equal deployment of basic and enhanced telecommunications services. Therefore, the Commission must investigate the merger proposal thoroughly in order to fulfill the Telecommunications Act's requirement that the FCC make an affirmative determination that approval of such mergers would serve the public interest. The Commission has full authority to perform such an investigation. 47 U.S.C. §§ 208(b)(1), 218, 219(b), 309(a) and 403. At a minimum, the Commission cannot approve the merger until it is able to find that the benefits flowing from potentially greater competition in the local markets materially outweigh the public interest costs associated with greater concentration in the cable, Internet, local and long distance markets.[2]

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[1] 47 U.S.C. § 254 (1996).

[2] *See* In the Matter of the Merger of MCI Communications Corporation and British Telecommunications, Plc., *Report and Order,* 12 FCC Rcd. 15351, ¶ 10 (1997) *("BT/MCI Order")*

As the Commission recently found in evaluating a smaller merger:

> A merger will be pro-competitive if the harms to competition -- *i.e.* enhancing market power, slowing the decline of market power, or impairing this Commission's ability properly to establish and maintain the competition that will be a prerequisite to deregulation -- are outweighed by benefits that enhance competition. If applicants cannot carry this burden, the applications must be denied.

If the Commission is unable to develop specific findings of tangible benefit, hearings or a supplementary inquiry is necessary. *Hawaiian Tel. Co. v. FCC,* 493 F.2d 771 (D.C. Cir. 1974).

AT&T and BellSouth both use Title III facilities, and universal and nondiscriminatory deployment is a relevant factor in considering Title III (and Title II) applications.[3] Moreover, issues of redlining, video franchising, network neutrality and anti-trust as they relate to the provision of universal service also apply to the business relationship between the company and its subscribers. As the Commission found in the *Bell Atlantic/NYNEX Order*, competition is the only public

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(where a merger "is likely to benefit competition in certain relevant markets and harm competition in other relevant markets ... we would need to balance the relative expected beneficial and harmful competitive effects, taking into account the relative size and importance of the markets involved, and the relative impact on U.S. consumers.") Petitioner notes, though, that the contention that unlawful concentration in one market can be overlooked on the basis of potential competition in another market is questionable at best. *See U.S. v. Phillipsburg National Bank,* 399 U.S. 350 (1970) *("Phillipsburg Bank")* (holding that severe anticompetitive effects in banking in one geographic market cannot be counterbalanced by a presumed competitive effect in a wider geographic market).

[3] The Commission has always found authority to promote diversity in its regulation of CARS licenses employed by cable television systems, even though consumers at home do not directly receive these microwave transmissions. *See, e.g., Prime Cable,* 4 FCC Rcd. 1696 (1989), *affirmed 5* FCC Rcd. 4590 (1990). Universal service concerns as they relate to equal deployment of facilities attach to CARS applications because CARS is ancillary to a broadcast-like service, cable television. Thus, universal service and diversity are public interest rationales for common carrier regulation, especially where a 4 common carrier seeks to enter into the cable industry. Congress recognized this when it enumerated the policies the Commission should foster in its efforts to eliminate market entry barriers such as "diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity" (emphasis supplied). 47 U.S.C. § 257(b).

interest factor to be considered when mergers arise: "Commission analysis of the effect of the transfer on competition is informed by antitrust principles, but not limited by the antitrust laws." *Bell Atlantic/NYNEX Order* at 132 (footnotes omitted), *citing, inter alia,* Capital Cities/ABC, Inc., 11 FCC Rcd. 5841, ¶¶ 82-99 (1996) for the principle that the "public interest includes concerns regarding diversity and concentration of economic power." *Bell Atlantic/NYNEX Order* at ¶ 67. *See also* Triathlon Broadcasting of Little Rock, Inc., 12 FCC Rcd. 13906, 13914 n.10 (1997). The benchmark for evaluating these economic and universal service issues is the Commission's "duty to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of [telecom] facilities ...." Teleprompter and Group W, 87 FCC 2d 531, 541, 1121 (1981), *aff'd,* 89 FCC 2d 417 (1982).[4] Also, as Former Commissioner Tristani noted, allegations of racial discrimination are a concern when determining whether proposed telecommunications mergers serve the public interest.[5]

The issues raised herein, including redlining, are a necessary component of any meaningful review of the competitive impact of a major merger. By revising Section 151 of the Communications Act to expressly provide for nondiscrimination on the basis of race, Congress was

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[4] The "concentration of economic power" in the hands of white males continues to be an impediment to the participation of minorities in the mainstream of commerce. Congress recognized this when it adopted Section 309(j)(4)(D) of the Act, providing that the Commission should "ensure that ... businesses owned by minorities and women are given the opportunities to participate in the provision of spectrum-based services." The Commission has found in Section 309(j)(4)(D) the broad authority to require common carriers to adhere to EEO requirements in order to "provide increased communications experience for minorities and women. This experience will, in turn, enable them more easily to become owners of communications enterprises." Regulatory Treatment of Mobile Services, *Third Report and Order,* 9 FCC Rcd. 7988, 1232 (1994).

[5] *MCI-WorldCom Order* (separate statement of Commissioner Gloria Tristani, dissenting in part).

directing the Commission to affirmatively prevent race discrimination when it regulates telecommunications services.[6] Moreover, among the nation's fundamental principles for telecommunications policy has been (and still should be) "preserving and advancing universal service to avoid creating a society of information 'haves' and have nots."[7]

A relevant factor under the public interest standard is "the complexity and rapidity of change in the industry" (*Bell Atlantic/NYNEX Order).* Thus, the Commission must impose requirements on a merger of this type that foster access to basic and enhanced telecommunications services, including high-speed Internet service, for rural and low-income America. To advance the goals of universal service in reviewing this merger, the Commission must heighten and expand the scope of its analysis of the Applications.

We are in the middle of a period of review and reassessment of the nation's telecommunications policy. AT&T has made so many major acquisitions over the last few years,

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[6] In 1934, Congress created the FCC for the purpose of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, as far as possible, to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges. 47 U.S.C. § 151 (1934). The version of Section 151 in the Telecommunications Act of 1996 adds, after the words "all the people of the United States", the words "without discrimination on the basis of race, color, religion, national origin, or sex." *See 47* U.S.C. § 151 (1996). The 1996 language did not limit the Commission's jurisdiction to "intentional" discrimination. Thus, the Commission's jurisdiction is not so attenuated as to exclude consideration of the many forms of discrimination as to which deliberate intent could never be proved. The reason this language should be given the most expansive possible reading is that the Commission has affirmative public interest obligations, flowing from Section 309 of the Act, which include avoiding the ratification or validation of all forms of discrimination. In light of the universal service provisions of the Act and recent rapid consolidation in the telecommunication industry, this point is more poignant now than ever.

[7] White House, *Administration White Paper on Communications Act Reforms,* January 27, 1994. The Department of Education has recognized that we are well on our way to becoming a society of information "haves" and "have-nots". In 1996, the Department found that schools in with predominately white student bodies are much more likely than schools with predominately black or brown student bodies to have Internet-access computers in their classrooms. National Center for Education Statistics, U.S. Department of Education, *Advanced Telecommunications in U.S. Public Elementary and Secondary Schools, 1995,* Report NCES-96-854 (February, 1996).

particularly last year, that there is no way to assess the validity of the promises they have made. This is due to the fact that the Commission has not had adequate time to assess the prior mergers made by the AT&T. Furthermore, to delay scrutiny of this merger until after the alleged pro-consumer and competitive benefits of other recent mergers involving AT&T have been given time to manifest is an adequate approach for the Commission to take. A six-month delay in the FCC's process of evaluation of the instant merger will provide the agency with time to formulate guidelines for the Applicants to proceed with the merger in a manner fully consistent with universal service principles as enacted by Congress, Department of Justice and the Commission. These companies have already engaged in long-term strategic planning, and they know exactly what their plans are. The plan, if one exists; to combat "redlining" should be set forth in detail. An even more reassuring and direct approach would be for the Commission to require conditions upon approval of the merger.[8] Thus, the public is far better served if the Commission tells the Applicants now what it expects of them, which can be done by either (1) encouraging the Applicants to voluntarily design a public interest plan against "redlining",[9] (2) imposing public interest conditions on its own motion,[10] (3) designating the applications for hearing (4) or denying them.[11]

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[8] Former Commissioner Tristani suggested this approach in the *MCI-WorldCom Order* when she stated that: "I respectfully disagree with [the majority's] decision not to impose some type of reporting requirement on the merged company that would facilitate [monitoring the merged companies' progress in the local residential market.]" *MCI-WorldCom Order* at 18173 (separate statement of Commissioner Gloria Tristani, dissenting in part).

[9] The Commission has encouraged "prospective merger partners to make pro-competitive commitments, whose likely effect in enhancing competition in some or all relevant markets outweighs the likely harmful effects that are expected to occur by reason of the merger." *BT/MCI Order* at 15357 ¶10 (fn. omitted). It has noted that such commitments may tip the balance in a close case, enabling the Commission to "find it in the public interest, convenience and necessity to approve the merger." *Id. See also Bell Atlantic/NYNEX Order* at 114. Such commitments are "binding upon the Applicants" and are enforceable through complaints pursuant to Section 208 of the Act or oppositions to future applications for radio licenses under Section 309 or for certificates of convenience and necessity under Section

The Petitioner asserts that there are substantial and material questions of fact that must be addressed before the Commission consents to this merger. They are: (1) whether AT&T (and its predecessors) engaged in redlining practices in the provision of its cable and high-speed data and Internet services, (2) whether the public interest would be harmed due to Applicants' failure to provide network neutrality for Internet service, and (3) whether the public interest would be harmed by further consolidation of market power in the telecommunications industry.[12] The Applicants should not be allowed to evade these issues in their applications and Public Interest Statement.[13] The Commission must compel the Applicants to explain their positions on each of these issues and provide the FCC and public with sufficient information to evaluate all public interest aspects of their proposed transaction.

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214. Id. 1191; see Central Television, Inc. v. FCC, 834 F.2d 186, 190 (D.C. Cir. 1987), *citing Willard Shoecraft (KINO), 3* FCC 2d 775, 776 (1966) ("[a]cceptance of a grant, with any attendant conditions, is presumed if no rejection occurs within thirty days of the grant's issuance.") The Commission itself can appropriately be involved in this process, as it is when it negotiates social contracts with cable systems.

[10] The Clayton Act permits the FCC to issue a cease and desist order and negotiate through a consent order such conditions as the public interest may require. 15 U.S.C. § 21(b) (1997); *See Bell Atlantic/NYNEX Order* at 129, n.57. The Commission may also grant with conditions any Title III application, 47 U.S.C. § 303(r) and 47 CFR § 1.110.

[11] The Commission must deny or designate a Title III application for hearing if there is an unresolved material question of fact., 47 U.S.C. § 309(e). *See, e.g., Tele-Media Corp. v. FCC,* 697 F.2d 409 (D.C. Cir. 1983).

[12] *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 397 (D.C. Cir. 1975) ("it would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish ... what is the very purpose of the hearing to inquire into.")

[13] *Cf RKO General, Inc. v. FCC,* 670 F.2d 215, 229 (D.C. Cir. 1981) ("the Commission is not expected to play procedural games with those who come before it in order to ascertain the truth[.]"). *See also, Stone v. FCC,* 466 F.2d 316, *rehearing denied,* 466 F.2d 331, 332 (D.C. Cir. 1972) (holding that consumers without access to material facts in the sole possession of a broadcast renewal applicant may perceive the renewal process as a "meaningful exercise or a never-ending battle for which [they] have insufficient resources.")

II. THE COMMISSION MUST ENSURE THAT THE PROPOSED CONSOLIDATION WILL NOT RESULT IN REDLINING AND A DISAPARITY OF SERVICES

Perhaps the most fundamental tenet of the Communications Act of 1934, as amended, is that all U.S. citizens should have the opportunity to avail themselves of the benefits arising from the development of communications technologies. Indeed, the FCC has observed that "the very first sentence of [the Commission's] organic law is to make available, as far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[14] Electing to deny service to a class of people based on race, ethnicity or income hardly seems to comport with the language of 47 U.S.C. § 151. Indeed, it seems impossible to approve this merger without a specific finding that the Applicants are not and will not engage in "redlining".

The members of the Commission have acknowledged their role in ensuring that such discrimination does not occur, and have indicated their willingness to make such assessments in the context of a merger review. In the words of Former Chairman Powell:

> *I believe there may be some merit in attaching some weight to discrimination concerns in our merger review when such discrimination contravenes carriers' universal service obligations or the traditional duty of common carriers to treat all customers equally .... To the extent allegations of racial and other forms of discrimination amount to violations of that duty, there may be an argument that such alleged violations should be given weight in our merger analysis.*[15]

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[14] *In the Matter of Federal Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd. 11501, 11618 (1998) (citing 47 U.S.C. § 151 (1996)).

[15] *MCI-WorldCom Order* at 18168 (1998) (separate statement of Michael K. Powell).

Former Commissioner Tristani spoke even more forcefully to the issue, stating: "I would underscore that I will always be concerned with allegations of racial discrimination in determining whether proposed telecommunications mergers serve the public interest."[16]

Much attention has been paid of late to the growing differences in access to and use of advanced telecommunications services and information technologies by people of different races and income levels. Published reports by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce and by the Benton Foundation illustrate the scope and nature of this phenomenon in dramatic terms.[17]

This merger has the potential, even likelihood as things now stand, to exacerbate these inequities. As alleged, AT&T has engaged in the practice of "redlining" -- denying or delaying the deployment of advanced or even basic telecommunications services to areas populated by low-income or minority residents. Even when AT&T has deployed in low-income or minority neighborhoods, there continues to be a disparity in the quality of service when compared to affluent and predominantly white suburban areas.[18] In each case, these practices violate the Communications Act and generally subvert the public interest. For these reasons, the Commission must demand that the Applicants discontinue these practices, and offer the same services on a fair and equitable basis to all.

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[16] *Id.* at 18173 (separate statement of Commissioner Gloria Tristani, dissenting in part).

[17] *See generally,* Nat'l Telecomm. & Information Admin., U.S. Dep't of Commerce, Falling Through the Net: Defining the Digital Divide (1999) *("NTIA Study");* Benton Foundation, Losing Ground Bit by Bit: Low-Income Communities in the Information Age (1998) *("Benton Study").*

[18] The assertions made by TAP in this section concerning "redlining" apply to the conduct of AT&T and it's predessor and affilliate companies (including SBC, Ameritech, PacBell, AT&T Wireless, DirectTV and Cingular, etc.).

A. AT&T Has Redlined Cable TV and Broadband Services

Although redlining in the provision of telecommunications services violates Communications Act, Petitioners allege that AT&T has been engaging in the practice for some time with respect to the provision of its cable television and cable-based Internet access services. AT&T allegedly built their systems in such a way that they largely avoided providing service to predominantly African-American neighborhoods. AT&T frequently planned its "rollout" of new services in high-income, affluent, non-minority areas. These areas often received the best technology, at the most reasonable rates with the highest quality installation and service technicians.[19]

Petitioners allege that AT&T engaged in systematic redlining in many franchises and service areas. Redlining also has taken forms other than the outright denial of access, whereas the residences of low-income ethnic areas were most often the last wired and last hired. When the companies serve minority or low- income neighborhoods, consumers can expect to receive a lower quality product on a delayed basis. Anecdotal evidence indicates that in at least some areas where AT&T provides service to "less desirable" low-income customers, local franchising authorities receive a higher volume of complaints concerning service quality.

In Florida, consumer complaints about redlining led to an action filed in August of 2002 in the U.S. District Court for the Southern District of Florida, alleging that AT&T engaged in "electronic redlining." Christopher Larmoyeux, the lead attorney for the plaintiffs, stated " We've looked at data

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[19] Whether AT&T intended these distinctions is irrelevant, since facially neutral practices that have a disparate impact on a protected class may still be deemed illegal, even in the absence of discriminatory intent. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971); *Koger v. Reno,* 98 F.3d 631, 639 (D.C. Cir. 1998); *Arnold v. U.S. Postal Service,* 863 F.2d 994, 996 (D.C. Cir. 1988).

that suggests that of those eligible areas that they could have provided the service, they've [AT&T] only done it in less than 1 percent for African-Americans, whereas they've tried to build virtually 100 percent of non-minority neighborhoods", *Multichannel News*, September 2, 2002.

In the past, AT&T, through its subsidiaries, has conducted redline assessments and research studies in numerous cities, counties and municipalities. The Petitioners hereby request that AT&T conduct new redline assessments for the following cities that are members of this alliance: Compton, CA, Detroit, MI, Monroe, LA, New Orleans, LA, and others identified by the CMA.

AT&T has, in the past, arbitrarily decided to add new costs to their cable systems, despite evidence that these costs have the effect of curtailing access to the system, especially for low-income users.[20] Still other low-income AT&T communities have suffered through inefficient and ineffective attempts to upgrade systems from coaxial to either hybrid coaxial/fiber optic or pure fiber optic cables; lengthy service outages; poor customer service; installation of above ground transmitters on residential property; closure of customer service offices; poor picture quality; failure of workers to keep service appointments; and, of course, rate increases.[21] In deciding whether to approve this proposed merger, the Commission should consider the past practices of AT&T's cable and telephone affiliated companies and impose conditions on the merger to ensure that these illegal practices do not continue.

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[20] *Multichannel News,* December 21,1998 at 17.

[21] *The Daily News of Los Angeles, July 16,* 1999 at SCI; *The Florida Times-Union, July 10,* 1999 at *3; The Atlanta Journal and Constitution,* May *6,* 1999 at North Fulton Extra, p. *I OJH; Sun Sentinel,* March 14, 1999 Community Close up at *3.*

B. "Redlining" Violates the Communications Act

Not only is redlining in opposition to universal service, it contravenes both the spirit and intent of the Act. Specific statutory provisions dealing with both the regulation of common carriers, as well as with the regulation of the provision of cable services, also prohibit the practice.[22] For example, Section 202(a) of the Act states as follows:

> *It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.*[23]

Refusing to offer all consumers in a service area access to the same services, and penalizing consumers because of the color of their skin or their socioeconomic status, violates this provision of the Act.

Moreover, Section 254 of the Act, dealing with universal service, further indicates Congress' intent that telecommunications services should be provided on a fair and equitable basis. Section *254(c)(3)* provides particular guidance, stating in part that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including ... advanced telecommunications and information services, that are reasonably comparable to those services" that are provided in urban or low cost areas. Although not directly applicable in the present context, the provision indicates a clear interest by Congress in ensuring that developments in communications

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[22] In light of the fact that provisions governing both common carriers and cable system operators prohibit discrimination in the provision of access, it is irrelevant for present purposes which category of technology these enhanced internet services fall into.

[23] 47 U.S.C. § 202(a).

technologies are enjoyed broadly, rather than selectively.

Where the provision of cable television service is concerned, Section 621 of the Act contains clear prohibitions against redlining. Section 621(a)(3) states as follows: "[i]n awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential cable subscribers because of the income of the residents of the local area in which such group resides."[24] Based in part on the House Report accompanying the bill containing the provision, the D.C. Circuit subsequently interpreted Section 621(a)(3) to prohibit redlining in the provision of cable services on the basis of income, and to permit a franchising authority to order that the cable provider offer service to the entire franchise area, in the event that evidence of such redlining comes to light.[25] In short, Section 621(a)(3) prohibits cable service providers from using a customer's income to determine whether they will serve that customer. Statutes seldom speak with such clarity; however, AT&T often ignored the spirit and language of these provisions of the Act.

C. "Redlining" Subverts the Public Interest

Before it can approve the proposed merger, the Commission must affirmatively conclude that the merger would further the public interest, convenience and necessity. Although the statutory prohibitions on redlining noted above provide some evidence of the nature of the public interest inquiry in this proceeding, the Commission's decision should be informed by other considerations as well. In particular, the Commission should consider the already substantial and ever increasing penalties paid by the residents of redlined neighborhoods. Indeed, prevention of redlining may be the

[24] 47 U.S.C. § 521(a)(3). The House Report accompanying Section 621(a)(3) even more specifically stated that, pursuant to the provision "cable systems will not be permitted to redline (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this type of practice." H. Rep. 934, 98th Cong., 2d Sess. at 59, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4696.

[25] *See ACLU v. FCC,* 823 F.2d 1554, 1580 (D.C. Cir. 1987).

single most effective means of stopping the resegregation of the U.S. into a society of information "haves" and information "have nots". With all that is at stake, the Commission should give substantial consideration to the impact of redlining on the public interest, and approve the merger only if it can conclude without reservation that the merged entity will avoid this practice.

D. AT&T Has Not Shown That They Will Not Redline in the Provision, Pricing and Access to Their Services

Despite the grave concerns raised by the prospect that the proposed merger would lead to increased redlining in the provision of access to telecommunications services, the Applicants have offered little evidence to suggest that they understand and will respond to the problem of redlining. The Applicants do not specifically discuss in their Public Interest Showing how they intend to deploy advanced (or basic) communications services in rural and urban communities. The Public Interest Showing acknowledges that the merger will increase the geographic scope in which AT&T can offer services, and that the recent mergers gave AT&T customers in only limited service areas.[26] However, the telecom facilities that AT&T would acquire through the proposed merger serve both high-income suburban communities and low income urban and rural areas. The Public Interest Statement says nothing about how basic and advanced telecommunications services will be deployed in these areas. As such, it appears that the various competitive benefits that the Applicants claim will result from the merger will not reach those consumers in greatest need of access to advanced telecommunications services.

The Communications Act, and substantial public interest considerations, require that the Commission consider very seriously the possibility that the proposed merger could lead to more redlining, and the attendant harms caused thereby. The Applicants have, to date, provided too little information on this critical concern for the Commission to give its blessing to this transaction. Of

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[26] Applications and Public Interest Showing

course, the door has not completely closed on this issue -- the Applicants may still be able to clarify their commitment not to redline in the provision of access to their services. But the Commission should be wary: any commitments by the Applicants could turn out to be little more than empty promises. Over the past 10 years, SBC, now AT&T, has made many promises in the context of mega-mergers that have not become reality. As such, the Commission should impose some conditions and penalties that continue after the transaction is completed, before accepting concessions from the Applicants that assuage redlining concerns. There is simply too much at stake for the Commission to do otherwise.

III. THE APPLICATION'S CLAIMS OF COMPETITIVE BENEFITS ARE SPECULATIVE

In its merger review analysis, the Commission is obligated to examine the competitive benefits of the proposed merger. This is not only an anti-trust review -- it is a comprehensive evaluation of many public factors.

The applicants claim that the proposed merger will produce substantial competitive benefits that will outweigh any conceivable harm. Specifically, the Applicants claim that benefits will arise in the telephone, Internet and cable services as a result of the merger. The Petitioner disagrees. The Petitioner sees the merger benefiting only two entities, the Applicants. AT&T appears to be wielding its mega-corporate structure to acquire all viable entities to position itself as one of the largest local, long distance, and Internet and cable service providers in the United States. Apparently, AT&T has not quite learned its lesson from the 1982 Modified Final Judgment Consent Decree that broke up its monopoly of the local and long distance telephone service. Although there are many more competitors in local and long distance telephone service as a result of this decision (as well as in the

cable, Internet and video programming), AT&T's greater dominance in these industries will result from this merger coupled with the other recent acquisitions over the past 10 years, BellSouth will undoubtedly position the New AT&T to be a mega-multi-service provider in these industries that will quash the competition. The new AT&T is larger and offers more services than the old AT&T that Judge Green ordered to divest.

A. The FCC Should Delay Reviewing the Merits of this Proposed Merger to Determine Whether the Stated Competitive Benefits in SBC/AT&T Merger Result in any Meaningful Competition

In the SBC/AT&T merger, SBC alleged that it would expand and accelerate incentives and abilities to compete with incumbent local exchange carriers in providing local telephone and cable services to residential customers, and develop and offer the next generation of IP telephony, broadband data and cable services within a foreseeable period of time.[27] However, the American public has yet to see any of these benefits manifest in the form of lower cable rates, high-speed Internet access and the like. AT&T may argue that enough time has not passed to allow these benefits to develop, which is precisely the Petitioners' point. AT&T appears to be so busy acquiring previous competitors that no real consumer benefits or competitive benefits are known to have resulted. The ink has not completely dried on the SBC/AT&T deal, nor have its alleged competitive goals been met. Therefore, the Petitioners believe that the Commission should determine if these benefits are being met by SBC and AT&T before approving AT&T's acquisition of BellSouth. The public interest dictates that meaningful competition occurs as a result of the SBC/AT&T merger, and that consumers benefit from lower rates and reasonably-priced access to high-speed Internet service and other services. Until these benefits are clearly evident, the Commission must not hastily approve another merger that only stabilizes AT&T's foothold in the local, long distance, wireless

[27] *See* FCC Decision in SBC/AT&T Merger (Order 05-183 November 17, 2005).

telephone markets and cable, satellite and Internet industries.

The Commission should not allow AT&T to claim that these mergers are interdependent or interrelated. The showing that SBC and AT&T made to gain FCC approval of the merger is wholly independent of the AT&T/BellSouth transaction. The Commission should require this merger to stand on its own merits without the consideration of AT&T's assets, which have yet to yield any competitive or pro-consumer benefits since its approval by the FCC.

B. AT&T'S Acquisition of BellSouth Will Cause AT&T To Become A Dominant Carrier Again

AT&T is no novice in the telecommunications industry, and has set the pace for many competitors to follow. The Public Interest Statement on its face admits that BellSouth can benefit from AT&T's brand name recognition, telephone network management expertise, telephone marketing, and customer care service.[28] BellSouth stands to gain much knowledge and expertise as well as access to a highly sophisticated telecommunications network. This fact does not concern the Petitioners. The Public Interest Statement indicates, however, that the merger with BellSouth will increase the geographic scope in which AT&T can offer service.[29] This concerns the Petitioners. By its own admission, AT&T plans to compete for customers for all types of telephone and video service. The problem arises when AT&T also wants to be the sole provider of these customers' cable, Internet and long distance service. AT&T hopes to leverage its expanding cable monopoly to dominate and impede competition in numerous adjacent markets. It appears that the days of monopoly of a peculiar service has ended, and now AT&T wants to be a conglomerate offering many, multilevel services to customers and approach monopoly

[28] See Applications and Public Interest Showing.

[29] See Applications and Public Interest Showing.

power over the entire industry.

Following this merger, the AT&T conglomerate will have access to approximately 80% of U.S. households including the Cingular Wireless system. If the Commission allows this to happen by approving this merger, the many competitors will be squashed in the process, and the consumer will be left without choice but to select AT&T for all, not some, of its telecommunications needs, rather than having the option of choosing its cable provider, ISP and its local and long distance telephone carrier. AT&T is classified as a dominant carrier who boasts communications revenues exceeding $100 billion. One company should not be allowed to have such power or access, and the Petitioner urges the Commission to deny the applications to avoid such an occurrence.

The Applicants will argue that the competitive benefits will never be attained but for the merger. However, the alleged competitive benefits are not really benefits for competition or the public, but benefits for the Applicants. The Petitioners cannot accept *carte blanche* the Applicants' assertion that this merger will be the utopia for competition in business telephone service, domestic long distance service, international telephone service, mobile telephone service, multichannel video programming distribution and video programming as alleged in the Public Interest Statement. The Applicants' Public Interest Statement fails to state how the merger will benefit any of these industries or what positive impact the merger will have on these industries. Without this information, it is far better for the Commission to commit to a less permanent solution of a contractual arrangement than agreeing to a merger between the Applicants.

IV. THE MERGER WILL RESULT IN ANTICOMPETITIVE HARM TO VIDEO PROGRAMMERS AND VIDEO PROGRAMMING DISTRIBUTORS AND WILL RESULT IN CONSOLIDATION OF THE CABLE INDUSTRY

Contrary to the Applicants' position, the merger will have adverse impact on video and cable

programming. One effect of this merger on video programming is the consolidation of bargaining power in video programming distribution by one monolithic distribution player. Without a doubt, AT&T plans to utilize its video distribution bargaining power with the acquisition of BellSouth. Unfortunately, AT&T has already shown its unwillingness to be reasonable in video programming distribution against low income citizens and potential competitors.

The Petitioner believes that small program service companies will not have neither financial nor bargaining wherewithal to negotiate with the consolidated power of AT&T and BellSouth. The current state of affairs in the cable industry already requires upstart programmers and distributors to receive a lower premium for cable licensing fees. In some instances, programmers have to pay for carriage on major cable networks. Many of AT&T's customers nationwide have complained that AT&T is getting bigger, but its service is not getting better.[30] Other customers have complained that AT&T has taken preferred programming off the air.[31]

AT&T cable subscribers are lodging complaints with local franchising authorities regarding programming and distribution issues, certainly the programmers themselves are not happy with the arrangements and decisions that AT&T has made with them. AT&T's presence will only exacerbate the problem. The Petitioners believe that one monolithic cable program distribution entity will yield much more bargaining power over cable programmers than a single cable distribution system alone, resulting in anticompetitive harm to these businesses.

AT&T controls many Internet access (and will own many more once the merger is complete). As a result, AT&T will have 98% of the U.S. and global cable Internet access services and 79% of

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[30] *The Manchester Union Leader,* July *15, 1998* at *5.*

[31] *Id.*

U.S. broadband Internet service. Furthermore, AT&T will control the backbone networks needed to establish links to the Internet hubs. Though its pending joint venture with TimeWarner, AT&T will integrate and control the content and the network for high-speed, local Internet access service for its captive cable customers.

Through its interests AT&T will completely control Internet access services over cable for its residential customers. A cable customer in AT&T's new service area will have to subscribe to the high-speed Internet Access over cable. The same customer also will have to buy its cable set-top box and cable modems from General Instruments, which also is controlled *de facto* by AT&T.

AT&T is well positioned to consolidate the cable and Internet access industries, and gain more dominant status in the world of telecommunications. The FCC should not allow such dominance in this industry.

V. NETWORK NEUTRALITY PROMOTES COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

"Network neutrality" is a voluntary but guiding principle of the Internet, which ensures that all users are entitled to open access to content and services, and are able to run applications and devices of their choice (See the House Communications Opportunity Enhancement Act of 2006 - COPE). It is no secret that AT&T does not want to permit open access to its network facilities for competing Internet service providers. The Commission should take judicial notice of AT&T's vigorous attempts to deny Internet service providers access to recently acquired facilities. In the words of one municipal official involved in the open access fight, allowing AT&T to acquire more properties "would place control of local cable and high-speed Internet access in the hands of one mega-company, and expose